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Supreme Court of the United States

October Term, 1948

No. 23

23

SOLOMON MICHELSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER

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Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court is reported in 165 F. 2d 732. A copy of the opinion is annexed hereto as Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a).

Statement of the Case

By an indictment (2-3),[1] containing two counts, filed on September 3, 1946 in the office of the Clerk of the United States District Court for the Eastern District of New York, the petitioner herein, Solomon Michelson, was charged in the first count, in substance, with giving a sum of money, to wit, Five Thousand Dollars ($5,000), to Maurice M. Kratter, Internal Revenue Agent, on or about July 29th, 1946, as a bribe, with intent to influence said agent's action in a matter pending before him in his official capacity; and in the second count with offering a like sum to the same agent with like intent on the same day.

Petitioner pleaded not guilty to the said indictment and a trial of the issues thus presented was had on December 9th and 10th, 1946, before Honorable Robert A. Inch, District Judge, and a jury. The trial resulted in a disagreement by the jury and a mistrial. A second trial was had before Honorable Harold M. Kennedy, District Judge, and a jury. A verdict of guilty on both counts was returned by the jury. The District Court, on January 16, 1947, imposed sentence of 18 months imprisonment upon petitioner on each count, the sentences to run concurrently, and further imposed a fine of $1.00 on count one and a fine of $2,500 on count two. On the same day judgment of conviction accordingly was filed in the Office of the Clerk of the said District Court (3-4).

Petitioner duly appealed from the said sentence and judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit. That Court, after hearing, rendered its decision on January 26, 1948, affirming said judgment of conviction on the first count for giving

[1] The indictment was drawn under United States Code, Title 18, Section 91. The text of the statute is annexed hereto as Appendix B.

the bribe, and reversing the said judgment of conviction on the second count for offering the bribe, holding that the separate crime charged in the second count had not been proved since, upon the evidence, defendant was guilty only of the offense charged in the first count (161-162).

The petition for certiorari was granted by this Court on the 5th day of April, 1948.

Petitioner was a licensed retail dealer in second-hand jewelry, whose place of business was located in a store at 74 Bowery, in the borough of Manhattan, New York City (69). Various other jewelry dealers also had space in that store for the conduct of their business (26, 71). The physical layout of these premises is described at pages 26 and 27 of the record on appeal.

The Internal Revenue agent, Kratter, had been assigned to audit petitioner's books. During the week of July 15, 1946, he visited petitioner's place of business for the purpose of determining whether petitioner's income tax returns for the year 1942 and 1943 were correct (6-7, 26-28).

A payment of $5,000 by petitioner to Kratter was not disputed at the trial. The principal and virtually the only issue presented was whether that payment was initiated by suggestions and threats on the part of Kratter or by proposals emanating in the first instance from petitioner. If, of course, it were established that the illicit arrangement originated in the mind of Kratter and was suggested by him to petitioner, then, under the doctrine of entrapment, petitioner could not be punished for the offense charged in the indictment (*Sorrells v. United States*, 287 U. S. 435).

Both Kratter and petitioner agreed on certain essential details of the transaction between them. Both men agreed that they went to lunch together and, after lunch, instead of returning at once to the store to complete the examination of the books, they sat together in the park for about forty-five minutes. There they discussed the size of the

amount which petitioner was to pay Kratter (12, 28-31, 75-78). Kratter admitted that he gave his approval to an arrangement to pay him money while in the park, when he testified (12):

> "Well, when Mr. Michelson kept insisting and refused to return to the store, I finally told him O.K. when he said he wanted to give me $1000 to straighten up his tax. Then immediately thereafter he said, "Make it $800" and I said, "O.K.", in order to get back to the store."

and he further testified (31):

> "Q. Now, you did consent to take $1000 at one period, did you? A. That is right."

After this discussion, they returned to the store. When Kratter had finished his examination for the day and was leaving to go home, the sum of $5000 was agreed upon (15, 33, 34), and Kratter gave petitioner his card on which he wrote his home telephone number (Government Exhibit 1, pp. 15, 34-35).

Kratter's testimony on this matter is as follows (34):

> "Q. After you left the premises on July 17 after 4 P. M. you say the defendant followed you out to the street? A. That is right."
>
> "Q. Talking to you? A. Yes."
>
> "Q. Was something said about $5,000 on the street? A. He asked me if I would take $5,000."
>
> • • •
>
> "Q. You say the figure reached $5,000? A. That is right."
>
> • • •
>
> "Q. You did say at some point on the street as you were walking with him you would accept $5,000? A. That was the end of the conversation."
>
> "Q. Did you say that or not? A. I did."

Michelson testified (79):

"He wrote down Gramercy 3-4372, and he gave me that card."

"He (Kratter) told me, This is my home telephone number. When you have the money ready, just call me up and let me know."

Kratter attributed this arrangement to what he said was petitioner's insistence on reaching an understanding (14-15). On the other hand, petitioner testified that it was because Kratter was pressing his demand for a payment (78).

Kratter finally reported the incident to his superiors and, under their direction, laid a trap which resulted in petitioner's arrest on a bribery charge (58-61).

The testimony is in sharp contradiction as to the date of the visit by Kratter during which the payment was discussed. Kratter asserted that the date was Wednesday, the 17th of July, 1946 (8). Petitioner testified that it was Monday, July 15th, the first day upon which he returned to the office after a vacation absence (71, 85-86).

Petitioner's testimony in this regard is strongly corroborated by that of the witness, Gerstein. He was another jewelry dealer who had his desk and stock of merchandise in the store at 74 Bowery and only a few feet from the petitioner. According to Gerstein's testimony, all of the merchants in business at that address took their vacations at the same time and the entire store was closed in the interval; all of them returned to business on July 15, 1946, and on that day Kratter called at the premises, was engaged in conversation with petitioner there, went out to lunch with the latter and returned with him later in the afternoon (105-106, 107-111).

This dispute respecting the date of the bargain between Kratter and petitioner is vitally important, because of its bearing upon the main issue as to which of the two first suggested the illicit arrangement.

Kratter admittedly did not tell any of his associates about his transactions or talks with petitioner until the afternoon of Thursday, July 18th, when he spoke "with one of the older agents" (17), and did not inform his superior, Agent Yung, about the matter until the next day, Friday, July 19th (17, 36, 62).

Those dates Kratter could not change and, if his arrangement with petitioner was made on Monday, July 15th, it was obviously difficult for him to explain, consistently with his own innocence, why he gave petitioner his home telephone number and thereafter waited four days before reporting the matter to his superior. That delay would accord far more naturally with petitioner's version that Kratter himself initiated the negotiations and brought it to the attention of Agent Yung only after deciding to abandon the idea following his talk on the afternoon of Thursday, the 18th, with his older associate, Rubinstein, who was not called as a witness.

Further testimony corroborating petitioner as to the date was given by the accountant, Abraham Osterfeld. Osterfeld testified that on Monday, July 15, 1946, he received a telephone call from Michelson's place of business and that the person with whom he talked gave his name as "Krapness or Kratter" (118), that this individual asked him whether he could see the petitioner's books, and also asked for the petitioner's 1942 return (118). Osterfeld further testified that on that same day when he was eating lunch at a cafeteria, he saw petitioner there with Kratter (119-121).

In addition, this witness also gave testimony corroborating petitioner as to another very important fact, viz., that after Kratter's visit to petitioner's place of business and on that same day, Kratter made a demand upon petitioner for a payment of money. As to this incident, Osterfeld testified that, on the evening of that day, petitioner informed him that Kratter had asked him for $5,000 (119, 122).

In that state of the record, petitioner produced witnesses to testify to his high repute for "honesty, truthfulness and as a law abiding citizen." The consensus of this testimony was that petitioner's reputation in these respects was "very very good, very honest" (115).

The first of these character witnesses was Mary E. Kirk who had known the petitioner for about fifteen years (112), or since 1932. On cross examination the prosecuting attorney asked this witness if she had ever heard that petitioner, on October 11, 1920, had been arrested for receiving stolen goods (112). Counsel for petitioner promptly objected and moved for the withdrawal of a juror. The Trial Court, at first, sustained the objection. The prosecuting attorney, however, handed the Court a memorandum on the matter. Thereupon the Court immediately reversed itself and permitted the question (113) and instructed the jury:

> "I say to you that regardless of her (the witness') answers, you are not to assume that the incidents asked about actually took place."

The question put to Miss Kirk, viz. whether she had ever heard of petitioner's alleged arrest in 1920, was repeated, over objection and exception, to three other character witnesses produced by petitioner (Oppenheim, 115; Weitzman, 117; Smith, 124). Each witness replied that he had heard no such rumor. Then on cross examination of the last witness, Smith, the Trial Court, in the presence of the jury, asked him (124):

> "Would it have made any difference if you had known that latter (i.e., the report of the 1920 arrest)?"

The witness replied:

> "I don't think so."

Assignment of Errors and Summary of Argument

1. The Trial Court committed reversible error in permitting the prosecuting attorney, over repeated objections, to cross examine petitioner's character witnesses as to an old and unrelated criminal arrest.

2. The errors in question require that petitioner be granted a new trial.

POINT I

The Trial Court committed reversible error in permitting the prosecuting attorney, over repeated objections, to cross examine petitioner's character witnesses as to an old and unrelated criminal arrest.

At the outset, counsel for petitioner frankly acknowledges that cross examination of character witnesses as to reports or rumors of prior acts of misconduct on the part of a defendant is permitted in many jurisdictions. The basis for permitting such cross examination is that it simply tests the grounds of the witnesses' knowledge of defendant's reputation (see the cases collected in 3 Wigmore on Evidence, Third Edition, Sec. 988).

Although the whole question seems to be an open one in this Court, we are concerned solely, on this record, with the propriety of such cross examination with regard to an arrest which did not result in a conviction.

Counsel for petitioner respectfully submits that a federal prosecuting officer should not be permitted to cross examine a character witness as to rumored prior arrests of a defendant whether or not such arrests relate to offenses similar to that for which the defendant is on trial.

In opposing the petition for certiorari herein, the Government, in its brief, misstates that position (p. 8). The position of counsel for petitioner has consistently been, as stated at page 6 of the petition for certiorari, that the rule permitting inquiry as to rumors of a defendant's previous arrests, "because of its objectionable features and mischievous results, should be authoritatively disapproved."

Professor Wigmore says that the serious objection to the rule is that the report of an act of misconduct, when presented to the jury, goes far to fix the misconduct as a *fact* upon the defendant. Thus, says the author, the rule violates the fundamental canon of fairness prohibiting the use of such facts, gets at them by hearsay only instead of by trustworthy evidence, and leaves the other person no means of defending himself by denial or explanation (Wigmore, op. cit., 988).

All those objectionable features of this type of cross-examination are aggravated when the report or rumor involved is that of a mere arrest of a defendant. As this same learned author says (Wigmore, op. cit., Section 980), the mere fact of having been arrested does not in itself indicate a defect in character. A contrary notion, so the author says, seems to have prevailed in English courts in the early 1800's but is certainly not judicially entertained in this country where an arrest is regarded by the courts as a mere accusation of crime. A different view, however, may well be taken by jurors who, while inclined perhaps to discount rumors of acts of violence or immorality, will no doubt give such rumors greater credence as being true in fact if the alleged acts of misconduct have reportedly resulted in arrests.

That the rule in question is difficult to apply and always works unfair prejudice to a defendant is abundantly illustrated by the present case.

The Trial Court, as previously mentioned, refused at first to permit inquiry as to petitioner's alleged previous arrest. Immediately thereafter, as counsel for petitioner reads the record, the Court, in deference to what it supposed was the peremptory requirement of the precedents cited by the prosecuting attorney, reversed its ruling and permitted the inquiry (112-113). But, of course, as even the cases cited by the Government show, the question asked was certainly one which the Trial Court, in its discretion, could properly have excluded. The Court was in error in supposing that it had no right to do so. Rather the Court seems to have supposed that it was bound, on the authorities cited, to admit the evidence. None of the authorities support that view but, on the contrary, hold that allowance or refusal of such an inquiry is a matter resting in the sound discretion of the trial judge (see *Spalitto* v. *United States*, 39 F. 2d 782, 787).

The Court's misapplication of the principle involved was again brought out at a subsequent point in the record. On cross examination of the last character witness, Smith, the Trial Court asked him in the presence of the jury (124):

> "Would it have made any difference if you had known that latter (referring to the report of the 1920 arrest)?"

The witness replied, "I don't think so."

Thus the Trial Court took the position that the relevant inquiry was what the character witnesses thought about petitioner's reputation. But, as all the authorities hold, such is not a permissible object of this type of questioning (*Sloan* v. *United States*, 31 F. 2d 902, 906; 3 Wigmore on Evidence, Third Edition, p. 618).

Although the Trial Court was not itself able to keep the refinements of the rule distinctly in mind, it attempted to impress those refinements upon the minds of the jurors by means of repeated instructions (113, 116, 137). The

artificiality of this whole line of inquiry is attested by the care which the Trial Court took to obtain the prosecutor's assurance that there had been such an arrest as the questions implied (130-131) and his meticulous caution to the jury, that they must not assume any such arrest to have been made (137).

Thus the Court instructed the jury (113):

> "I say to you that regardless of her (the witness') answers, you are not to assume that the incidents asked about actually took place."

Similar instructions were given later (116):

> "Again I say to the jury there is no proof that Mr. Michelson was arrested for receiving stolen goods in 1920, there isn't any such proof. All this witness has been asked is whether he had heard of that. There is nothing before you on that issue."

And in its charge to the jury (137) the Court stated:

> "* * * there isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods and that fact you are not to hold against him:"

The mere fact that the Court went to unusual lengths in cautioning the jury as to the relevancy and weight of such evidence indicates clearly the importance of the problem, not only to the defendant but also to the Court. What effect has such a question to a character witness by a federal prosecutor? He is a public officer owing a duty to the Government and to the defendant as well. His statements and questions in a court room are generally accepted by jurors as correct and proper. When we add the persistent instructions to the jury, we reach the con

clusion that both the question and the instructions serve to impress upon the jury the fact,—not directly admissible in evidence,—that the defendant has been arrested on one or more occasions and is an habitual criminal. Is a prosecutor to be permitted to ask an unlimited number of questions regarding previous arrests? Or, if the trial judge, in his discretion limits the inquiries, upon what basis is the selection to be made? Is not a defendant who has had a previous arrest or arrests not indirectly deprived of his right to call character witnesses in his behalf?

Furthermore, the rule was so applied in this case as seriously to prejudice the petitioner. The court, to be sure, prior to the conclusion of the trial, required the prosecutor's assurance that the arrest had been made. The prosecutor gave such assurance, but the defendant could not challenge the assertion. It was, at best, a reckless assurance. The prosecutor undoubtedly had an abstract from a police record furnished to him by his investigator. In these circumstances we have placed before the jury a suggestion that this defendant had been arrested for receiving stolen goods when the prosecutor can only be sure that he had been arrested. In other words, twenty-seven years before the trial, an unidentified police officer apprehended a man. The arresting officer made a record of the arrest and a statement that the arrest was for receiving stolen goods. How can the prosecutor be sure that the arresting officer correctly evaluated the facts and properly determined that those facts would constitute the crime of receiving stolen goods. Subjected to analysis, the facts surrounding the arrest might warrant a much less invidious charge than receiving stolen goods. We know that the defendant was not convicted of such a charge for, if he had been, the prosecutor would have confronted him with the record of conviction. In this way, a presumably innocent man was prejudiced twenty-seven years later by a suggestion made, at a critical turn in his affairs, that he

had been arrested for receiving stolen goods, and he had no opportunity to explore this collateral issue either to show that the arrest was unjustified or that the circumstances prompting the arrest did not by any means constitute receiving stolen goods.

The Trial Court was well aware of the telling blow that this question had inflicted upon petitioner, as witness its labored instructions to the jury in an attempt to remedy the damage that had obviously been inflicted upon petitioner by a line of inquiry that its first sure instinct had told it was prejudicial.

Moreover, it has been repeatedly held that character witnesses may not be cross examined as to rumors of alleged acts of misconduct which are *remote* in time (*Sloan v. United States*, 31 F. 2d 902, 906; *State v. Bell*, 206 Iowa 816, 221 N. W. 521; *People v. Willis*, 301 Ill. 307, 133 N. E. 859; *Barnett v. State*, 34 Ariz. 129, 268 P. 611). That rule was here disregarded and especially in the case of the witness Kirk, who had known petitioner only since 1932. Yet the prosecutor was permitted to question her with regard to an incident alleged to have occurred twelve years prior to her acquaintance with petitioner and twenty-six years prior to the trial. We respectfully submit, that that was serious error since the courts have long recognized that cross examination of character witnesses as to rumored acts of misconduct by a defendant is a dangerous practice and must not, in the interest of good faith and fairness, be extended beyond its true limits (*People v. Elliott*, 163 N. Y. 11; *Evans v. Commonwealth*, 211 Ky. 709, 277 S. W. 1029).

Further, the remoteness of the rumor of an arrest in 1926 from any of the issues of the trial is important in determining the good faith of the prosecuting attorney. On the question of good faith the authorities are very exacting. Thus Wigmore says (3 Wigmore on Evidence, Third Edition, p. 624):

> "The value of the inquiry for testing purposes is often so small and the opportunities of its abuses in underhand ways are so great that the practice may amount to little more than a mere subterfuge and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

In other words, if the prosecuting attorney's real purpose is not so much to impeach a character witness as it is to get before the jury by subterfuge matters prejudicial to defendant and not directly admissible, such matter should be withheld from the jury (*Pittman* v. *United States*, 42 F. 2d 793, 797; *People* v. *Marendi*, 243 N. Y. 600, 617, 618; *State* v. *Barnes*, 194 Iowa 628, 190 N. W. 38).

The New York law does not permit the fact of a previous arrest to be alluded to on cross examination of a defendant. (*People* v. *Cascone*, 185 N. Y. 317; *People* v. *Crapo*, 76 N. Y. 288; *Kemp* v. *United States*, 151 F. 2d 680, 687, 688; *United States* v. *Modern Roofing & Battat Co.*, 159 F. 2d 656, 658.) Therefore, one result, and a very important one from the standpoint of the prosecution, was to get before the jury an alleged arrest of petitioner that could not have been proved directly.

This line of inquiry left the petitioner helpless to refute the charge, if untrue, or to explain that it ultimately proved to be unfounded, if that were the fact. We respectfully submit that, when a prosecutor poses such question, he oversteps the bounds of propriety and fairness.

In *Berger* v. *United States*, 295 U. S. 78, this Court at page 88 said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution

is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The questions posed by the prosecutor in this case simply tended to persuade the jury to believe that petitioner was a person of bad character and an habitual criminal. Certainly the only reason for asking those questions was to create bias and prejudice in the minds of the jurors.

As already noted, the alleged fact of the petitioner's arrest more than 26 years before the trial was placed before the jurors not once or twice but repeatedly both by the prosecutor's cross examination of the four character witnesses, and by the trial judge's comments and his charge to the jury.

The wisdom of stringently limiting this type of cross examination has been recognized by the Illinois courts. (*Aiken* v. *People*, 183 Ill. 215; *People* v. *Page*, 365 Ill. 524; *People* v. *Hannon*, 381 Ill. 206.)

In the *Aiken* case, cited *supra*, the Court held that "a witness who has testified in a criminal case that the general reputation of the accused as to being a peaceable and law-abiding man is good, cannot be asked, on cross examination, whether he has heard rumors of the accused having been connected with former criminal acts." At page 222, the Court pointed out:

"There is no ground for holding that the evidence, although inadmissible, did no harm. It must be remembered that the defendant was on trial for a

serious crime, and it was his right to have the evidence confined to the charge in the indictment, and evidence which had a tendency to excite the passion or prejudice of the jury, as the evidence in question certainly did, and which had no legitimate bearing on the charge upon which the defendant was arraigned, could not do otherwise than lead to an erroneous verdict."

In *People* v. *Page*, 365 Ill. 524, the prosecutor was permitted to ask a character witness on cross examination in a criminal case if he ever heard of defendant's being arrested. The Court held it to be reversible error even though the witness answered in the negative, as in the case at bar. The Court said (p. 528):

> "The questions asked on cross examination had no justification. Their tendency was to prejudice the jury against the defendant. * * * Where such aspersions appear in the record the question is not what a court of review may think of the defendant's guilt or innocence but what the jury would have done if the case had been submitted to them without those aspersions."

The general rule laid down in the *People* v. *Hannon* case, cited *supra*, is stated at page 211, as follows:

> "Where the matters about which the inquiries are made have no connection with or relation to the offense charged, it is reversible error to ask such questions, even though objections thereto are sustained."

It was the suggestion of Judge Frank, who wrote the opinion in the Court below, that this Court should tell the lower federal courts to follow this so-called "Illinois Rule" (161). In the final paragraph of the foot note he stated:

> "Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction,

> the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, i. e., that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial."

That suggestion, if adopted, would undoubtedly restrict the kinds of possibly unfounded accusations that could be aimed at the character of a defendant. But it is the position of counsel for petitioner, and he respectfully urges it upon this Court, that the sounder rule would altogether forbid a prosecutor to make such use of any prior criminal charges that did not result in conviction. Then a defendant, whose character had in truth never been shown to be otherwise than good, might show that fact to the jury without running the risk of having it besmirched by charges which had never been proved to be based on fact.

POINT II

The errors in question require that petitioner be granted a new trial.

It is well established that, even in a criminal case where the defendant's guilt is almost conclusively proved, evidence of his good character is of the utmost importance. This Court, in *Edgington* v. *U. S.*, 164 U. S. 361, in referring to evidence of good character, stated that the circumstances may be such that a reputation for good character, if relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing (p. 366):

> "* * * the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt.

> The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." (Emphasis mine.)

Now, as previously pointed out, the principal issue in this case was a close one (*cf. Berger* v. *United States*, 295 U. S. 78, 89). That issue, simply stated, was whether Kratter or petitioner was telling the truth as to which one of them initiated the alleged bribe transaction. The scales were not, we submit, evenly balanced between petitioner and his accuser because certain glaring improbabilities, already referred to, weighed against Kratter's testimony. Those circumstances—taking them most favorably to Kratter—showed that he first made an arrangement with petitioner whereby the latter was to pay him $5,000 and thereafter, while petitioner was trying to raise the money, changed his mind, reported the matter to his superiors and worked with them to lay a trap which has resulted in petitioner's being the only party held to answer for the alleged illicit bargain between them.

In that view, this is not a "strong" case for the prosecution and, therefore, the errors complained of require that petitioner be granted a new trial. The admission of the objectionable questions not only deprived petitioner of the probative force of the evidence of his good character but also placed before the jury facts, not otherwise admissible in evidence, which tended to create in the minds of the jurors the impression that petitioner was an habitual law offender, and deprived him of his right to a fair trial. The undue prejudice to petitioner, thereby created, strongly indicates that his guilt was not "found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts" (*Bollenbach* v. *United States*, 326 U. S. 607, 614).

CONCLUSION

The judgment of conviction should be reversed and a new trial granted under the first count of the indictment.

Respectfully submitted,

LOUIS J. CASTELLANO,
Attorney for Petitioner.

LOUIS J. CASTELLANO,
DANIEL MCNAMARA,
of Counsel.

Appendix A—Opinion

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—October Term, 1947.

(Argued January 8, 1948 Decided January 26, 1948.)

Docket No. 20818

UNITED STATES OF AMERICA,

Appellee,

v.

SOLOMON MICHELSON,

Defendant-Appellant.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of conviction, on two counts, entered by the United States District Court for the Eastern District of New York. Affirmed as to the First Count; Reversed as to the Second Count.

J. VINCENT KEOGH (Mario Pittoni, of counsel), *for appellee.*

LOUIS J. CASTELLANO (Brooklyn, N. Y.), *for appellant.*

Appendix A—Opinion

Defendant was indicted and tried in the Eastern District of New York for violation of 18 U. S. C. A. §91 which provides in part as follows: "Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."

The first count of the indictment reads: "That on or about the 29th day of July, 1946, within the Eastern District of New York, the above named defendant, Solomon Michelson, did give a sum of money, to wit: Five Thousand Dollars ($5,000.00), to an officer and a person acting for and on behalf of the United States in an official function under the authority of the Treasury Department, to wit: Maurice M. Kratter, Internal Revenue Agent, with intent to influence his decision and action on a question and matter then pending before him in his official capacity, with intent to influence said Internal Revenue Agent to collude

in and allow a fraud on the United States and to induce him to do an act in violation of his lawful duty in respect to the defendant's income tax return. (Title 18, United States Code, Section 91.)" The second count is identical with the first, except that the words "to offer" are substituted for the word "give." The jury found defendant guilty on both counts. The judge sentenced him to imprisonment for eighteen months on the first, and to imprisonment for eighteen months and a fine of $2,500 on the second, the prison sentences to run concurrently.

FRANK, *Circuit Judge*:

The Second Count

We think that Congress, as it lawfully may, provided that to "offer" a bribe and to "give" a bribe are two distinct crimes even when parts of a single transaction, since the one (to "give") involves an element which the other (to "offer") does not.[1] The test, as stated in *Morgan* v. *Devine*, 237 U. S. 632, 640, is whether "separate acts have been committed with the requisite criminal intent. * * *" The present case does not meet that test. Kratter, the principal government witness, testified as follows: On July 17, 1946, in New York City,[2] defendant offered him

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[1] *Blockburger* v. *United States*, 284 U. S. 299, 303-304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632, 640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Lindsay* v. *United States*, 134 F. (2d) 960, 961 (C. C. A. 10); *cf. American Tobacco Co.* v. *United States*, 328 U. S. 781, 787-788.

[2] New York City is in the Southern District of New York.

a bribe of $5,000, and he told defendant he would take it.[3] Defendant then said that, when he had the money, he would telephone Kratter. On July 26, defendant, on the telephone, told Kratter that he had the money and wanted to meet Kratter to give it to him. On July 29, Kratter by phone, arranged with defendant for a meeting at a room in the St. George Hotel in Brooklyn.[4] Kratter went to that room. His own words, as to what then occurred, follow: "A few minutes later there was a knock on the door. I opened the door and Mr. Michelson came in, and I closed the door after him. He dropped a package on a dresser or chifferobe, something like that that was in the hotel room, and he sat down and I sat down. I asked him if he

[3] Kratter's testimony as to that conversation is as follows:

> "Q. Did you and Mr. Michelson have a conversation while you were walking along together? A. Yes, a conversation ensued during the walk. Mr. Michelson kept insisting that I do something to straighten out his tax return and fix things up for him so he wouldn't get into too much trouble. He offered me $3,000 while we were walking toward the subway, and then he said, 'Make it $5,000.' I told him I wouldn't touch that kind of money, I wasn't interested in it, I didn't want to get mixed up in that situation. Then he kept insisting. We had walked about two or three blocks from his office, and I finally stopped in the street and kept talking to him. He refused to leave me, and insisted that we come to some sort of agreement regarding his tax situations. I finally told him —he said, 'Will you take $5,000?' And he told me he would pay another $5,000 to the Government. I finally said 'O. K.,' in order to get away from him, and he told me he would call me up when he had the money, and he asked me for my business card and home telephone. I gave him one of my cards and wrote down the phone number while we were standing on the street, and then we parted."

[4] Brooklyn is in the Eastern District of New York.

had the money, and he said, 'Yes, it is in the bag over there.' I took the bag, unwrapped it, and he took out a large number of five, ten and twenty-dollar bills, and he said, Mr. Michelson said, 'There is $5,000 there.' I made a quick count of the bills and satisfied myself that there was approximately $5,000 in the package * * * " Defendant's conduct at that Meeting in Brooklyn constituted his performance of the agreement of July 17—an illegal bargain resulting from a previously accepted offer—to give the $5,000 bribe. He did not on that day or at any other time in the Eastern District both offer and give. He merely gave.[5]

The offer of July 17 cannot sustain the conviction on count 2. For defendant made that offer in New York City in the Southern District, and the defendant was indicted and tried in the Eastern District. Had that offer been specified in the indictment, defendant, thus warned of the improper venue, would have waived the lack of proper venue by going to trial without interposing an objection.[6] The same might have been true if, during the trial, defendant had in some manner been put on notice that the government intended to rely on that New York City offer as a crime, for which he was being tried. But here there

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[5] Kratter testified that after he had thus received the money, "I asked Mr. Michelson what he wanted me to do for the money, and he told me he wanted me to turn in a report which would indicate that he owed about $1,200 on his 1943 tax return and about $900 on his 1942 return. He said that was all he wanted me to do. Then I told him, 'You understand the only reason I am doing this is because you insist upon it, isn't that so?' And he said, 'Yes, that is right.'"

This conversation did not show a new offer but merely arrangements for carrying out the details of the previous agreement.

[6] *United States* v. *Jones*, 162 F. (2d) 72 (C. C. A. 2).

was nothing so to notify him. Indeed, the trial judge, in his charge, told the jury that the issue was whether defendant gave or offered to give, or both, $5,000 to Kratter on July 29 at the Hotel St. George. We therefore conclude that we must reverse as to the second count.

Alleged Errors as to the First Count

1. The defendant called three character witnesses who testified that he had an excellent reputation for "honesty, truthfulness and being a law-abiding citizen." On cross examination, they were asked whether they had heard (a) that in 1927 he had been convicted in a New York court and sentenced to pay a fine of $100 or 30 days in jail, and (b) that in 1920 he had been arrested for receiving stolen goods.

The judge, out of the jury's presence, received the assurance of the government's counsel that defendant had been thus arrested in 1920. The defendant, on the witness-stand, had previously admitted the conviction in 1927. The judge, when these witnesses were being questioned, said: "However, I instruct the jury that what is happening now is this: the defendant has called character witnesses, and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community, and since the defendant tenders the issue of his reputation the prosecution may ask the witness if she has heard of various incidents in his career. I say to you that regardless of her answer you are not to assume that the incidents asked about actually took place. All that is happening is that this witness' standard of opinion of the reputation

of the defendant is being tested. Is that clear?" In his charge to the jury, the judge said: "In connection with the character evidence in the case I permitted a question whether or not the witness knew that in 1920 this defendant had been arrested for receiving stolen goods. I tried to give you the instruction then that that question was permitted only to test the standards of character evidence that these character witnesses seemed to have. There isn't any proof in the case that could be produced before you legally within the rules of evidence that this defendant was arrested in 1920 for receiving stolen goods, and that fact you are not to hold against him; nor are you to assume what the consequences of that arrest were. You just drive it from your mind so far as he is concerned, and take it into consideration only in weighing the evidence of the character witnesses." The questions were of the kind often held proper in examining "character witnesses."[7] That being the rule, we see no abuse of discretion in permitting them to be asked here.[8] Defendant asserts error in putting

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[7] See, *e.g.*, *Mannix* v. *United States*, 140 F. (2d) 250, 252 (C. C. A. 4); *Josey* v. *United States*, 135 F. (2d) 809, 811 (App. D. C.); *Spalitto* v. *United States*, 39 F. (2d) 782, 785-787 (C. C. A. 8); *cf. Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C.).

[8] Wigmore, *Evidence* (3d ed. 1940) §988, after noting that "such inquiries are almost universally admitted," not as "impeachment by extrinsic testimony of particular acts of misconduct," but as means of testing the character "witness' grounds of knowledge," continues with these comments: "But the serious objection to them is that practically the above distinction between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts—cannot be maintained in the mind of the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct

the question about the 1920 arrest to a witness who had known defendant only since 1932. We cannot agree, for she might have heard rumors of an arrest which happened before she knew him.

3. On direct examination by his own counsel, defendant testified to his conviction in 1927 on a charge of possessing counterfeit watch-dials, but that he had no other trouble since he had been in the United States. On cross examination, defendant testified that, in 1930, in an application signed by him for a license for vending second-hand jewelry, he had never been arrested for any offense. Thereupon he was asked whether he had stated in this applica-

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as a fact upon the other person, and thus does three improper things,—(1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue. Moreover, these are not occurrences of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhand ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith."

Because, as Wigmore says, the jury almost surely cannot comprehend the judge's limiting instruction, the writer of this opinion wishes that the United States Supreme Court would tell us to follow what appears to be the Illinois rule, *i.e.*, that such questions are improper unless they relate to offenses similar to those for which the defendant is on trial. See *Aiken* v. *People*, 183 Ill. 215, 55 N. E. 695; *cf. People* v. *Hannon*, 381 Ill. 206, 44 N. E. (2d) 923.

tion that he had been convicted of "counterfeiting trademarks on watches." His counsel objected on the ground that the conviction had been for "possession of counterfeit." The court said, "Sustained on that ground." Government counsel then asked, "You did not say in that paper that you had been arrested and that you were convicted of that charge?" No objection was made. We find no prejudicial error.

4. Defendant complains that the judge in his charge unfairly interpreted the testimony of a witness, Osterfeld, in a manner prejudicial to defendant. We think the interpretation not unfair. But, even assuming the contrary, there is no reversible error. In the first place, defendant did not object to this part of the charge.[9] In the second place, the judge made it plain that, despite his comments on the evidence, the jury were to rely on their own recollection of the evidence.

AFFIRMED AS TO THE FIRST COUNT; REVERSED AS TO THE SECOND.

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[9] *United States* v. *Marino*, 141 F. (2d) 771 (C. C. A. 2). Nor did he object to a question the judge put to that witness, a question, moreover, which we think entirely proper.

Appendix B—Statute Involved

Title 18, United States Code, Section 91, states in part:

"Whoever shall promise, offer, or give, * * * any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, * * * with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or to omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the things so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made or tendered, and imprisoned not more than three years."